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How the Local Government Center lost its appeal

The state Supreme Court squarely rejected the LGC's claim that members of the boards of risk pools have discretion to control what is to be returned to members as surplus

By Andru H. Volinsky | February 21, 2014

On Jan. 10, the New Hampshire Supreme Court denied the appeal of the Local Government Center in a 21-page decision written by Justice Robert Lynn. There were no dissents.

The court upheld Administrative Hearing Officer Donald Mitchell's administrative order in most material respects, including provisions that required the LGC to refund more than $52 million to its members. The decision quoted liberally from Mitchell's Aug. 16 order, and the Court agreed with the Bureau of Securities Regulation's interpretation of the risk pool statutes that require the annual return of surplus funds to risk pool members.

The court squarely rejected the LGC's claim that the members of the boards of directors of risk pools have discretion to set contingent reserves and thereby control what is to be returned to members as surplus. The decision approved Mr. Mitchell's formula for determining surplus for return.

The court also rejected the notion that a risk pool may legally hold excess funds for purposes of rate stabilization and rejected the practice of "returning" funds through complex rate-crediting schemes.

Surplus funds must be annually returned as cash or in specific premium holidays.

The court decision appears to reject the bureau's ability to set future contingent reserve levels by prescribing a particular measure, such as the maintenance of contingent reserves at 15 percent of claims.

Similarly, the decision appears to reject the bureau's ability to order that reinsurance be purchased in the future.

Fees recalculation

However, the court prescribed clear rules about how contingent reserves are to be calculated in the future. These rules should obviate most disputes going forward.

For example, although the bureau may not order the LGC to buy reinsurance in the future, the court specifically prohibits the LGC from maintaining reserves so large that reinsurance is unnecessary. As a result, the LGC should continue to purchase reinsurance for its programs as a practical necessity to protect against unexpected claims.

The court remanded the matter to Mr. Mitchell to recalculate the fees due the bureau from the LGC. A fee reimbursement order will be issued and the LGC will be required to pay the bureau's legal fees in addition to the fees paid to its own lawyers.

This recalculation of legal fees will account for a small reduction in fees that results from the minor matters on which the bureau's position was not upheld and the addition of fees incurred by the bureau to litigate the appeal.

Mr. Mitchell also ordered the LGC to end its parent-subsidiary corporate model because it created too many conflicts for the managing board of directors. The LGC formally withdrew its appeal of this provision of the order in August 2013, and the order in this respect became final at that time.

After the court's decision was returned, the bureau was advised by the LGC's Health Trust that it had months earlier secretly acquired all of the assets of the LGC's property liability trust, including the liabilities of the insolvent workers' compensation program. The LGC claims this acquisition satisfies the requirement that the workers' compensation program reimburse members of the Health Trust pool $17.1 million that were paid in illegal subsidies to keep the LGC's workers' compensation program afloat.

The acquisition of one risk pool by another has many implications that the Bureau of Securities is now investigating.

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